Petition

No. 81-1883

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED AIR LINES, INC.,

Petitioner,

vs.

GERALD E. SMALLWOOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether an age 35 restriction on pilot trainees imposed for the purpose of maximizing safety and based upon the best medical information and long experience in operations and training methods meets the statutory standard of a bona fide occupational qualification.

PARTIES

The parties in the Court of Appeals for the Fourth Circuit were Gerald E. Smallwood, United Air Lines, Inc. and the United States Equal Employment Opportunity Commission. Smallwood and United were parties to the District Court action. The Commission entered the case by filing an *amicus curiae* brief before the Fourth Circuit.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated November 28, 1979, is not officially reported. A copy of the Opinion appears in the Appendix hereto at A1.

The Opinion of the Court of Appeals for the Fourth Circuit, dated October 8, 1981, is reported at 661 F. 2d 303. A copy appears in the Appendix at page A12.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1981. United's Petition for Rehearing En Banc was denied on January 8, 1982. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act of 1967, as amended,[1] 29 U. S. C. § 621, *et seq.* (hereinafter referred to as "ADEA" or the "Act"), specifically Sections 623(a)(1) and 623(f)(1) read as follows:

> "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"

> "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age;"

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[1] The Act has been amended on several occasions since its original passage in 1967. These amendments, however, have not involved changes relevant to the issues of this case.

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IN THE

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OCTOBER TERM, 1981

UNITED AIR LINES, INC.,

Petitioner,

vs.

GERALD E. SMALLWOOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner United Air Lines, Inc. (hereinafter "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered October 8, 1981 in Case Number 80-1111, *Gerald E. Smallwood* v. *United Air Lines, Inc.*

STATEMENT OF THE CASE

This is an action brought under the Age Discrimination In Employment Act of 1967, 29 U. S. C. § 621, *et seq.*, by one Gerald E. Smallwood, who had unsuccessfully sought employment with United as an airline pilot. The action seeks injunctive relief requiring United to employ him, and to pay compensatory and liquidated or punitive damages, attorneys' fees, costs and interest. Jurisdiction was based upon the Act and 28 U. S. C. § 1331.

On or about July 22, 1977, Smallwood, then 48 years of age, sent United his application for employment as an airline pilot. Smallwood's application reflected employment for the preceding ten years with Overseas National Airways of Jamaica, New York, as well as previous pilot positions with World Airways of Oakland, California, and the United States Air Force from 1951-57. Following review of the application, United informed Smallwood by letter of August 24, 1977 that he did not meet its requirements for hire in that his age exceeded United's maximum age for the new hire of pilots.[2] Smallwood responded to United's rejection with a letter dated August 29, 1977 in which he stated his belief that his age should not be "disqualifying" and requested reconsideration. By letter of December 12, 1977, United affirmed its earlier rejection stating that it would not process applicants who exceeded 35 years of age.

Subsequently, on March 24, 1978, Smallwood gave notice to the Department of Labor of his intent to sue United and following unsuccessful conciliation in April, 1978, was notified by that agency in its letter of May 19, 1978, to proceed in the manner he deemed appropriate to protect his interests. Suit was filed in the United States District Court for the Eastern District of Virginia at Alexandria, the Honorable Albert V. Bryan, Jr. presiding, on May 18, 1979. United subsequently answered, essentially admitting that it had refused to hire Smallwood but asserting that its maximum age of hire restriction constituted a bona fide occupational qualification (referred to hereinafter as "BFOQ").

At the trial of this matter held on November 28, 1979, Smallwood presented the testimony of only one witness, *i.e.*,

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[2] Although the age limitation at the precise time of Smallwood's original application was 29, the policy was at that time under review and was very shortly thereafter modified to age 35. It is the age 35 limitation which was defended as a bona fide occupational qualification at the trial of this matter.

Dr. Stanley R. Mohler, a one-time Chief of a division of the Office of Aviation Medicine of the Federal Aviation Administration and at the time of trial in private practice in Dayton, Ohio. Dr. Mohler testified, in essence, that age alone is never a factor which in any manner negatively affects a pilot's capabilities and that more "experienced" pilots are "safer" pilots. He also testified to an alleged high degree of predictability for the incidence of coronary attacks.

United defended its policy on the ground that it constituted a BFOQ based upon safety considerations.[3] In support of its position, United presented the testimony of Captain J. D. Smith, United's Senior Vice President for Flight Safety, and Dr. George J. Kidera, retired Vice President of Medical Services for United and former Chairman of national and international committees and academies of aerospace medicine.

Captain Smith testified to United's initial and recurrent training program and the importance of United's cockpit progression system as a means of ingraining United's "crew concept" philosophy of flying.[4] Specifically, he stated that the program provides continuous and repeated exposure to United's philosophies, policies and procedures so as to insure

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[3] In light of the legislative history of the Act, in which then-Secretary of Labor Wirtz specifically stated the airline pilot's situation to be justifiable economic BFOQ, United also presented one witness and certain testimony regarding the extensive costs associated with pilot training. United's primary defense, nonetheless, was always based upon the safety considerations of its policy.

[4] Although it varies in certain specifics from pilot to pilot, United's general line of progression for pilots proceeds from Second Officer (sometimes called Flight Engineer) to First Officer (sometimes called Co-Pilot) to Captain or First-In-Command. The system also integrates in varying degrees a general progression from the smaller B-737 aircraft to the much larger B-747. The program, as a whole, has received the sanction and approval of the Federal Aviation Agency.

prompt and properly coordinated United crew responses in emergencies. As a corollary, evidence was also presented by both Captain Smith and Dr. Kidera regarding the difficulties associated with "untraining" a crew member such as Mr. Smallwood from the operational policies and philosophies of his prior employers.

Dr. Kidera testified generally to certain natural and inherent deprecations associated with the process of aging in humans and the fact that prolonged exposure to a given flying philosophy such as that provided by United's line of job progression substantially overcomes the effects of these deprecations. He also testified to the relative degree of predictability associated with various medical ailments.

At the conclusion of trial, the District Judge held that United had met its burden of establishing the age limitation as a bona fide occupational qualification (BFOQ). The Court's findings were based upon the testimony of both Captain Smith and Dr. Kidera. Regarding Captain Smith's testimony, the Court found:

> "The line of progression leading from initial assignment of a Second Officer to a 737 aircraft to the retirement of a United Captain, constitutes a valuable apprenticeship which, with its constant training and retraining according to United procedures, greatly enhances the safety of the traveling public by providing pilots who are highly trained and respond to various exigencies in a skilled and coordinated manner." (A9.)

Regarding the testimony of Dr. Kidera, the Court held:

> "The defendant's correct, I think, in stating that the hiring of persons in an older age group and by 'older' I mean in excess of 35, increases those persons in the higher categories. And those categories statistically show a greater incidence of cardiovascular impairments, which, apparently, from the statistics, make up a greater portion of the disabilities that are encountered."

Further, concerning the various psychophysiological declines associated with aging, the Court found:

> "Such declines may be substantially overcome or compensated for by virtue of the individual's having been exposed for long periods of time to a standard means of operation and functioning under emergency circumstances." (See A10.)

Smallwood appealed the District Court's decision to the Court of Appeals for the Fourth Circuit.

The Court of Appeals rendered an opinion on September 17, 1981, which was subsequently withdrawn. Following further consideration, the Court re-released its opinion on October 8, 1981, reversing the decision of the District Court and holding its findings to be "clearly erroneous".[5]

The Circuit Court's opinion did not address the District Court's finding and the unrebutted evidence that United's line of job progression is a significant factor in enhancing safety. The Court focused instead upon the single aspect of the testimony concerning difficulties in the "untraining" of pilots with experience in prior flight procedures and philosophies. It dismissed this critical issue on the statement by Dr. Mohler that most of today's younger airline pilots are taken directly from the Navy or the Air Force, whenever these pilots are available.

While the Court agreed that the aging process has certain negative effects on humans, it ignored the undisputed testimony of Dr. Kidera on which the District Court relied that some of the critical deprecations associated with aging are overcome by the long-term discipline and exposure to United's operational

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[5] Changes made in the opinion in the interim concerned the rationale implemented by the Court in rejecting United's contention on cross-appeal that Smallwood had not timely filed his Notice of Intent to Sue.

procedures and philosophy. Similarly, the Court of Appeals paid scant attention to a 38 year United study on pilot medical qualifications and the inability of medical science to detect many of these conditions in advance. The Appellate Court relied upon the evidence of Dr. Mohler as to the predictability of medical emergencies, although that testimony was restricted to the single medical condition of coronary attacks.

On October 22, 1979, United petitioned the Fourth Circuit Court for a rehearing en banc. The petition was denied on January 8, 1982.

REASONS THE WRIT SHOULD BE GRANTED

This appeal involves the legal validity of a maximum age of hire for new pilots which was implemented by United in the interest of maximizing safety in air transportation. The Circuit Court's decision striking down United's policy is in direct conflict with a decision of the United States Court of Appeals for the District of Columbia, which upheld a similar restriction imposed upon new pilots by American Airlines.

In overturning the District Court decision in United's favor, the Circuit Court failed to apply the proper standard of judicial review. The effect of this failure is to create the present conflict and raise serious questions related to the maximization of safety in air transportation.

I.

THE CIRCUIT COURT'S DECISION DIRECTLY CONFLICTS WITH THE RECENT DISTRICT OF COLUMBIA CIRCUIT CASE OF *MURNANE* v. *AMERICAN AIRLINES*

Contemporaneous with the progress of the Smallwood case through the trial and appellate stages, the District and Circuit Courts for the District of Columbia were considering the case of one Edward Murnane.[6] Like Smallwood, Murnane was a veteran pilot who sought employment with a major commercial airline (American) and had been denied the position based upon his age (43). Also similar to the present case, the airline's primary defense was that an age restriction for new hire pilots was valid, based upon both operational and medical justifications.[7] Both the Murnane and Smallwood District Courts were presented with evidence concerning the physical declines associated with aging and the value of the carrier's line of cockpit progression in producing the safest captain and crew possible.

On November 8, 1979, less than three weeks before the District Court's decision in *Smallwood*, the District Court for the District of Columbia announced its decision in *Murnane*. The latter Court held that long-term, day-to-day exposure to American's inflight and cockpit procedures and discipline (*i.e.* "philosophy") minimized safety-related risks and thus enhanced the safety of the traveling public.[8] Subsequently on November 28,

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[6] The District Court opinion is reported at 482 F. Supp. 135 (D. D. C. 1979); the Circuit Court opinion is found at 667 F. 2d 98 (D. C. Cir. 1981).

[7] Although American had a general guideline restricting the hiring of new pilots over age 30, an age restriction of 40 was considered by the court, as those persons under 40 were outside the group protected by the ADEA.

[8] The *Murnane* court found the average period of time necessary to progress from hire to captain for American to be 16 years. The District Court in the instant case made an identical finding for the duration of United's line of progression.

1979, the District Court in the instant case announced its decision, consistent in logic and result with *Murnane* and upholding United's age limitation. Both Smallwood and Murnane appealed.

Smallwood and *Murnane* were argued to their respective appellate courts in February of 1981. On October 1, 1981, following issuance of the Fourth Circuit's initial opinion, but prior to release of its final and corrected decision, the Circuit Court for the District of Columbia rendered its decision in *Murnane.* In affirming the District Court and upholding the age restriction, the Circuit Court agreed that American's line of job progression had the effect of maximizing the safety of the traveling public by minimizing the risk of pilot error:

> "... [T]he safest captain will be experienced and as much of that experience as possible will have been with American" ...
>
> "... [B]y limiting its new hiring to relatively young pilots, American insures that the experience *with American* of its active captains will be *maximized.* This, as we pointed out earlier, maximizes safety." *Murnane,* 667 F. 2d at 100. (Emphasis added.)

As the language of the decision well illustrates, the Circuit Court recognized both the importance of consistency in experience and the value of long-term exposure thereto.

Just one week later and despite evidence and findings of fact virtually identical to those in *Murnane,* the Fourth Circuit rejected the validity of United's age limitation and reversed the District Court's opinion. The Circuit Court stated:

> "... [T]here is no reliable evidence that United's 'crew concept' would be impaired by the sole factor of hiring Flight Officers, starting as Second Officers, over the age of 35." (A 19-20.)

The conflict in the decisions of the Circuit Courts is clear and unequivocal.

The immediate effect of this conflict in the law of the Circuits is to place in doubt the continuing legal validity of the pilot selection and training systems of United, American, and virtually all other major air carriers which employ a similar line of progression to reduce the possibility of pilot error. The conflict thus presents serious questions affecting safety.[9]

II.

THE EVIDENCE AT TRIAL ESTABLISHED THAT UNITED'S RESTRICTION ON AGE AT HIRE CONSTITUTES A BFOQ

In announcing its decision following trial, the District Court stated the standard by which it judged the evidence presented by United:

> "First of all, it's not encumbent upon the defendant to convince me to a certainty that Dr. Kidera is right as opposed to Dr. Mohler. I must say that I'm persuaded by Dr. Kidera, but I don't think they have to go so far as to prove to a certainty that Dr. Kidera is right or that Dr. Mohler is wrong.
>
> "The defendant need only show that it has a reasonable cause to believe, by which is meant that there is a factual basis for that belief, that all or substantially all people over 35 would be unable to perform safely and efficiently the duties of flight officer." (A2)

In quantifying the amount of evidence required to sustain the BFOQ as that sufficient to support "reasonable cause", the Court followed the lead of the various other Courts which had considered the issue. *Weeks* v. *Southern Bell Telephone &*

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[9] The conflict in the present state of the law has also begun to have repercussions beyond the major U. S. airlines into areas of private enterprise and governmental service. (See, for instance, *Equal Employment Opportunity Commission* v. *City of Los Angeles*, 526 F. Supp. 1135 (C. D. Cal. 1981), which rejects the maximum age of hire limitation.)

Telegraph Co., 408 F. 2d 228, 235 (5th Cir. 1979); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 863 (7th Cir. 1974) *cert. denied*, 419 U. S. 1122 (1975); *Arritt* v. *Grisell*, 567 F. 2d 1267 (4th Cir. 1977).

The reason for applying this particular standard is well stated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 238 (5th Cir. 1976):

> "The employer must, of course, show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound."

The District court expressly relied on the testimony of both Captain J. D. Smith and Dr. George J. Kidera in sustaining United's BFOQ (A2). Captain Smith's testimony included evidence of the value of United's line of progression as a recurrent training mechanism. His testimony also focused upon the nature of problems associated with hiring pilots of broad prior experience and related this testimony to the various difficulties associated with integrating Capital Airline pilots into United's flying philosophy when merger of the companies occurred in 1960. These difficulties resulted in at least one major aircraft landing accident involving a former Capital pilot who reverted to his prior training practices during an emergency. Plaintiff Smallwood presented no expert witnesses to controvert the testimony of Captain Smith.

Dr. Kidera's testimony, as noted in part above, covered areas of the deprecations associated with aging and the predictability of certain medical ailments and emergencies. Regarding the deprecations, his testimony reflected that both the ability to learn new matters and the speed and efficiency with which they are learned are subject to a marked and steady decline directly associated with advancing age. He also testified

that the psychophysiological function, *i.e.*, the speed with which a person recognizes a problem and is able to physically respond thereto, also declines proportionally with advancing age. Most importantly, however, the Doctor stated that such declines were substantially overcome or compensated for where one has been exposed for an extended period of time to a consistent system or philosophy of flying. Smallwood's witness, Dr. Mohler, introduced no evidence directly contrary to the studies and testimony of Dr. Kidera and, in fact, appeared to agree on the value of experience to overcome physical declines.

On the issue of the predictability of medical emergencies, Dr. Kidera introduced a study and presented testimony covering a wide variety of medical ailments which had over the period of some 38 years of United's history been the cause of medical disqualifications of its pilots. He testified at length, for example, to the inability of medical science to predict the onset of vascular transischemic episodes, which are short-term or transient incapacitating strokes. The testimony reflected an increased incidence of such strokes associated with advancing age and the Doctor concluded that to increase the number of persons in the higher age categories, by striking the age limitation, would be to increase the chances of inflight medical emergencies. Regarding this entire body of evidence, Dr. Mohler addressed only the predictability of one ailment, coronary attacks.

Flying experience alone does not make pilots safer flyers. It is long experience in consistent training methods, together with the best medical information available which have provided United with reasonable cause to believe that the "crew concept" philosophy increases safety. A long, ingrained, single system of training disciplines pilots to respond, particularly in times of emergency, as a team with coordination and skill. United's evidence, thus, meets the statutory standard justifying BFOQ.

III.

THE CIRCUIT COURT RECOGNIZED BUT FAILED TO APPLY THE PROPER STANDARD OF REVIEW

Early in its review of the District Court's opinion, the Circuit Court quite properly stated that the District Court's findings of fact could be set aside only if "clearly erroneous." (A) Fed. R. Civ. p. 52(a). Having properly delineated the standard, however, the Court clearly failed to apply it. The Circuit Court ignored the significant findings of the District Court and the evidence supporting them. It chose, instead, to substitute itself as finder of the facts.

On the issue of whether United's present training program and line of progression enhanced safety, the Circuit Court addressed itself to a single aspect of the testimony presented, *i.e.,* Captain Smith's testimony regarding the difficulties of "untraining" applicants similar to Smallwood from prior flight procedures and philosophies. Lacking contrary expert testimony, the Court nonetheless rejected United's concerns in this regard relying upon a statement of the medical witness, Dr. Mohler, to the effect that "most of today's younger airline pilots are taken directly from the Navy or the Air Force, whenever these pilots are available." (A14). The Court presumably found this "fact" to be inconsistent with Captain Smith's concern.[10]

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[10] Although the comment itself did not refer to United as one of the airlines which hired such personnel, any such pilots who were hired would necessarily have been under 35 years of age. The Court's rationale is tenuous at best. Plainly there is a sharp distinction between a young military pilot who becomes a commercial pilot and will fly in accordance with the carrier's method of training and a pilot who is 48 years old with years of varying commercial experience and flying philosophies.

The Circuit Court's focus upon the untraining issue is curious in light of the fact that the issue is never mentioned in the District Court's opinion. Indeed, while the District Court doubtless considered that body of evidence along with others, the real foundation of its opinion is stated to be the inability of a person over 35 "to acquire the necessary experience," that is to learn the United system, in order to safely and efficiently carry out the duties of a flight officer. The Circuit Court's undue emphasis upon the untraining issue is patently misplaced.

Similar difficulties accompany the Circuit Court's reasoning on the testimony of Dr. Kidera. Despite the District Court's statement that it was "persuaded" by the testimony of Dr. Kidera, the Court inexplicably concluded that "the District Court expressly did not adhere to the views of either medical expert in reaching its decision." (A17). Thereupon, the Court embarked upon its examination of the predictability of medical emergencies, ultimately concluding, as previously noted, that coronary attacks, at least, were sufficiently predictable so as not to present an undue hazard of inflight medical emergency.

In sum, the Circuit Court, while properly stating the standard of review, has clearly misapplied it and substituted its judgment for that of the District Court.

IV.

THE CIRCUIT COURT'S OPINION FAILS TO RECOGNIZE AND CONSIDER AIRLINE EXPERTISE IN THE AREA OF PILOT HIRE AND TRAINING

In the 1972 case of *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972), the Court of Appeals for the Tenth Circuit made the following observations regarding safety in the air transportation industry and the role of the Court with respect to safety issues:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any

> pre-employment standards or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. Cf. 29 C. F. R. § 1607.-5(c)(2)(iii). The job of airline flight officer is clearly such a job. United's flight officers pilot aircraft worth as much as $20 million and transport as many as 300 passengers per flight. The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employee to lower his pre-employment standards for such a job." *supra* at 219.

Despite distinctions often said to exist between the BFOQ standards of *Hodgson* and *Usery* (and correspondingly, *Arritt*, which adopts the *Usery* approach), both courts agree with the *Spurlock* decision in these important respects. In fact, the *Usery* court stated:

> "We emphasize safety in busing just as we would in a variety of other industrial areas where safety to fellow employees (or, here, passengers) is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards, which, if they err at all, should err on the side of preservation of life and limb." 531 F. 2d 238.

In over 50 years of commercial aviation, the airlines and the Federal Aviation Administration and its predecessors have continuously pursued the common goal of eradicating to the fullest extent possible the potential for human error in air transportation. Studies such as those conducted and addressed by Dr. Kidera and operational expertise born of experience such as related by Captain Smith have played a substantial role in changing flight "from a mode of transportation which was

originally considered 'inherently dangerous' to one which is the safest mode now available." *Murnane,* 482 F. Supp. at 146. Yet the Circuit Court chose to ignore the testimony of Dr. Kidera and Captain Smith. While an airline is certainly not beyond judicial review in safety matters, it is equally true that a court errs where, as here, it ignores the airline's experience and expertise.

V.

THE CIRCUIT COURT'S DECISION PLACES UNITED IN CONFLICT WITH ITS STATUTORY DUTY TO OPERATE WITH THE HIGHEST DEGREE OF SAFETY AND THUS ENDANGERS THE PUBLIC SAFETY

As a duly licensed and certificated air carrier, United is under a duty pursuant to the Federal Aviation Act of 1958 to conduct its business in a manner insuring the "highest possible degree" of care for the safety of the traveling public. 49 U. S. C. § 1421(b). See also, *Condit* v. *United Airlines,* 558 F. 2d 1176 (4th Cir. 1977). Indeed, it has been repeatedly held, and Smallwood did not here dispute, that safety in the air transportation of persons is the very essence of an airline's business. (See e.g. *Diaz* v. *Pan American World Airways, Inc.,* 442 F. 2d 385 (5th Cir. 1971), *cert. denied,* 404 U. S. 950 (1971).) A further and serious effect of the Circuit Court's decision is thus revealed, its sanction of a pilot selection and training system which fails to satisfy the degree of care statutorily required.

As reflected above, United's experience and studies had shown the need for a program which maximized the likelihood of prompt and coordinated crew response and minimized the effects of certain declines associated with aging. United's establishment and periodic review of a maximum of hire limitation was not only a natural and prudent reaction to the information on hand, but truly one mandated by Section 1421(b).

Section 1421(b) speaks in terms of the "highest possible degree" of care. Substantial safety is not sufficient; the safest circumstance attainable is required. As the Court noted in *Harriss* v. *Pan American World Airways*, 437 F. Supp. 413 (N. D. Cal. 1977), this burden carries even into areas of risk which may seem insubstantial to the lay person:

> "As an air carrier with the public duty to operate with the highest degree of safety, Pan Am is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the essence of Pan Am's business, since aircraft accidents and incidents are invariably unique and low-probability occurrences." *Harriss, supra* at 434.

In acknowledging that "United's crew concept is designed to foster safer flight techniques" (A 18) but then minimizing the significance of United's experience with untraining (A 19) and overstating medical science's ability to predict "potentially disabling medical conditions" (A 21), the Court betrays its application of a lesser standard. In the view of the Circuit Court, United's difficulties with untraining are insignificant, further, the predictability of coronary attacks is deemed sufficient to overcome concerns of inflight medical emergencies.

United respectfully submits that the Circuit Court's standard does not provide for the highest degree of care and thus conflicts with the mandate of Section 1421(b). Such a result is not dictated by *Arritt, supra.*[11]

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[11] To the extent that the result is deemed consistent with the standard of *Arritt* and *Usery*, a clear and important conflict exists with the Seventh Circuit's decision in *Hodgson, supra.* Given the importance of the issues raised by such a conflict, this Court should address and resolve the conflict in the law of the Circuits.

VI.

CONCLUSION

For the reasons stated above, United respectfully requests this Court to grant its Petition For A Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: April 6, 1982

Appendix

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Alexandria Division

GERALD E. SMALLWOOD,
Plaintiff,

v.

UNITED AIR LINES, INC.,
Defendant.

CIVIL ACTION NO. 79-446-A

TRANSCRIPT OF PROCEEDINGS

Alexandria, Virginia

November 28, 1979

Before: THE HONORABLE ALBERT V. BRYAN, JR.,
United States District Judge

Appearances: MICHAEL C. MONTAVON, Esquire,
Counsel for Plaintiff

GREGORY L. MURPHY, Esquire,
Counsel for Defendant.

[244] THE COURT: I conclude that the defendant has borne its burden of establishing that its 35-year-old maximum age for new hires is a bona fide occupational qualification.

And in support of that conclusion, I have the following factual and mixed conclusions of law:

First of all, it's not encumbent upon the defendant to convince me to a certainty that Dr. Kidera is right as opposed to Dr. Mohler. I must say that I'm persuaded by Dr. Kidera, but I don't think they have to go so far as to prove to a certainty that Dr. Kidera is right or that Dr. Mohler is wrong.

The defendant need only show that it has a reasonable cause to believe, by which is meant that there is a factual basis for that belief, that all or substantially all people over 35 would be unable to perform [245] safely and efficiently the duties of a flight officer.

I think Dr. Kidera furnishes that factual basis medically, and I think Captain Smith establishes that factual basis in determining that experience is a valid basis upon which to believe that persons hired after they are 35 would be unable to acquire the necessary experience for one reason or another to efficiently perform the duties of a flight officer.

The defendant's correct, I think, in stating that the hiring of persons in an older age group—and by "older" I mean in excess of 35—increases those persons in the higher categories. And those categories statistically show a greater incidence of cardiovascular impairments, which, apparently, from the statistics, make up a greater portion of the disabilities that are encountered.

The job qualification is stringent, but the defendant's entitled to impose a stringent job qualification taking into account the high degree of care and high degree of skill, the high degree of care owed by the airline in performing its business, and its business is the safe transportation of passen-

gers from one place to another, and the high degree of skill is required in flight officers who have to perform that business.

I have no problem and do find that the job-relatedness, which is necessary to establish the BFOQ, has [246] been established. Certainly the job qualification is related to safe transportation of passengers and is reasonably necessary to that business.

Moreover, if not impossible, it seems to me it is impracticable, impractical, to deal with these items on a case-by-case basis; that is, determine whether each person who might be over 35 might have such qualifications that he or she could be accepted, where I think a broad across-the-board rule is the practical and reasonable way to proceed.

And for that conclusion I look to Dr. Kidera's testimony again where he said that certain of these impairments have their onset in such a subtle way that really they cannot be detected in the ordinary physical examination.

These findings I adopt as the Court's findings of fact. I will prepare an order in which I will adopt what I have said from the bench and borrow, perhaps, from the parties' proposed findings of facts and conclusions that they have submitted.

Needless to say, it is unnecessary to reach the question of damages. Despite the sincerity with which it is advanced, I do not base my holding on any economic hardship or economic considerations.

Court will stand adjourned. Well, I have got another matter to take up.

Call the next case.

MR. MURPHY: Thank you, Your Honor.

[5] COURT REPORTER'S CERTIFICATE

I, Donald E. Brayboy, Official Court Reporter for the United States District Court, Eastern District of Virginia, Alexandria Division, do hereby certify that the foregoing transcript of proceedings, numbering pages 1 through 5, inclusive, is a true, correct and complete transcript of proceedings before The Honorable Albert V. Bryan, Jr., United States District Judge, and heard November 28, 1979, at Alexandria, Virginia.

Given under my hand this 17th day of January 1980.

/s/ Donald E. Brayboy
Donald E. Brayboy
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Alexandria Division

GERALD E. SMALLWOOD,
Plaintiff,

v.

UNITED AIR LINES, INC.,
Defendant.

CIVIL ACTION NO. 79-446-A

ORDER

For the reasons stated from the bench, it is hereby

ORDERED that this action be dismissed and judgment entered in favor of the defendant. In further support of the ruling the Court adopts Paragraphs 1 through 32 and 34 of the defendant's Proposed Findings of Fact as its own.

/s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 28, 1979

A true copy, teste:
W. Farley Powers, Jr., Clerk

By A. Briel
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Alexandria Division

GERALD E. SMALLWOOD,
Plaintiff,

v.

UNITED AIR LINES, INC.,
Defendant.

Civil Action No. 79-446-A

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW defendant United Air Lines, Inc. (hereinafter referred to as "United") and states as its findings of fact and conclusions of law the following:

FINDINGS OF FACT

1. This is an action brought by the plaintiff, Gerald E. Smallwood, against United in which plaintiff seeks employment with United as a pilot, compensatory and liquidated and/or punitive damages pursuant to the Age Discrimination Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, as amended (hereinafter referred to as the "Act").

2. Plaintiff is a white male born May 7, 1929, who made application to United on or about August 22, 1977, at the age of forty-eight (48) years for enrollment in United's flight officers training program.

3. Plaintiff's application was rejected on or about August 24, 1977, on the basis that he exceeded thirty-five (35) years of age, a maximum age limit established by United with respect to such applications.

4. Plaintiff gave notice to the Secretary of Labor of his intent to sue United on or about March 24, 1978.

5. United's policy relating to the hiring of pilots consists of three (3) stages:

a. A determination is made whether the applicant meets United's minimum basic requirements deemed necessary to provide a basis for further training;

b. The applicant meeting the minimum basic requirements is interviewed, administered a series of tests relating to pilot aptitude, psychological profile and general condition of health and again interviewed;

c. Applicants successfully completing stage two of the application process are placed upon a waiting list and, to the extent requirements dictate, is subsequently enrolled in new hire training at the training center. The priority of preference to such new hired training is based upon a quantitative score achieved as a result of the processing in stage two.

6. The applicants are not employees of United and are in no manner compensated by United until enrollment in the new hire school of the training center.

7. Plaintiff Smallwood was rejected by United at the initial stage of the pilot hire program, i.e., for failure to satisfy the minimum basic requirements deemed necessary by United.

8. Upon successful completion of training in the training center and assuming job positions are available, a graduate is normally assigned to United's fleet in the entry level capacity of second officer on a 737 aircraft. Such individual, however, remains on probationary status for a period of one (1) year.

9. As a second officer for United, a pilot receives additional training relating to his or her duties upon each transition to a new type of aircraft, and he or she further receives annual training in the form of proficiency checks and proficiency tests or both.

10. The period of time served by a United pilot in the position of second officer averages eight (8) years.

11. During a second officer's tenure, a United pilot has numerous specific duties which he or she learns to perform according to United's operations procedures manual.

12. A United pilot's tenure as a second officer serves as a foundation for his service as a first officer.

13. In becoming a first officer for United, a pilot receives additional training relating to his or her duties and responsibilities as first officer.

14. Additionally, a first officer for United receives annual training in the form of proficiency checks and proficiency tests or both.

15. The period of time served by a United pilot in the position of first officer currently averages eight (8) years.

16. During his or her tenure as a first officer, a United pilot has numerous specific duties which he or she learns to perform according to United's operational procedures manual.

17. A United pilot's tenure as a first officer serves as a foundation for his service as captain.

18. In becoming a captain for United, a pilot receives additional training relating to his or her duties and responsibilities as captain.

19. Additionally, a captain for United receives annual training in the form of proficiency checks and proficiency tests.

20. During his or her tenure as a captain, a United pilot undertakes numerous and specific duties and responsibilities as detailed in United's operational procedures manual, in the interests of best insuring the safe transportation of his passengers and crew.

21. A captain is required by the Federal Aviation Agency's mandatory retirement policy to retire at age sixty (60) and he may not at United "bid-down" to any other cockpit position.

22. The line of progression leading from initial assignment of a second officer to a 737 aircraft to the retirement of a United captain constitutes a valuable apprenticeship which, with its constant training and retraining according to United procedures, greatly enhances the safety of the travelling public by providing pilots who are highly trained and respond to various exigencies in a skilled and coordinated manner.

23. Any substantial alteration of this period of progression, either in the actual line of progression or in its duration, will necessarily cause a decrease in the high safety factor created thereby.

24. Relating to matters of health, the Federal Aviation Agency requires that all captains of commercial aircraft undergo twice annual physical examinations.

25. Over and above the Federal Aviation regulations, United maintains a separate health program which calls for annual physical examinations conducted by company physicians for all members of cockpit crews.

26. The focus of United's annual examination policy is to supplement the examinations required by the Federal Aviation regulations and, further, to prescribe preventative measures where necessary to prevent the development of medically disqualifying illnesses or afflictions in its pilots.

27. United's efforts in establishing such a company medical program have reduced the incidents of medically disqualifying illnesses or afflictions to substantially below that of other groups within the population, including groups of pilots of at least one competing air line which lacks such a medical treatment program.

28. The great weight of medical evidence indicates that the process of aging causes a depreciation in numerous body organs and systems, including the digestive system, the lymphatic system, skeletal and muscular changes, vision and hearing losses and reductions, and decline in psychophysiological functioning.

29. Depreciation in ability to learn and/or retain information is reflected in United's own studies relating to training failures among its pilots.

30. While the rate of depreciation is dependent upon numerous factors and varies from person to person, such depreciation occurs in all persons.

31. Decline in psychophysiological functioning is pertinent and related to safety in the operation of commercial aircraft.

32. Such declines may be substantially overcome or compensated for by virtue of the individual's having been exposed for long periods of time to a standard means of operation and functioning under emergency circumstances.

33. United has created and maintained a comprehensive and very costly training system to insure the continuing capabilities of its pilots.

34. United presently employs approximately 6,000 pilots.

35. According to a study conducted by United in 1978, and based upon 1976 costs, United invests a total of $210,600.00 in career training costs of one pilot hired at age twenty-five (25).

36. The total career pilot costs of the aforesaid individual, according to such study, is the sum of $3,330,600.00.

37. On the basis of the same study, United's career investments in a pilot first hired at age thirty-five (35) are $176,700.00 pure training costs and $2,790,800.00, total career costs.

38. On the basis of the same study, and calculations based thereon, it is evident that an increase in the general age of hire of United pilots would substantially increase United's total costs of training and maintaining its flight crews.

CONCLUSIONS OF LAW

39. The legislative history of the Act is clear that where, as here, substantial costs and expenditures are incurred in training and maintaining flight crews for an air line, a maximum age of hire of thirty-five (35) constitutes a bona fide occupational qualification under the Act.

40. United's age thirty-five (35) maximum hiring policy constitutes, again, a bona fide occupational qualification on the basis that it is reasonably related to the primary interest of the industry and safety and the evidence is clear that a change in such policy would have a negative impact on this primary concern.

UNITED AIR LINES, INC.
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PUBLISHED

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 80-1111

GERALD E. SMALLWOOD,
Appellant,

v.

UNITED AIR LINES, INC.,
Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

No. 80-1153

GERALD E. SMALLWOOD,
Appellee,

v.

UNITED AIR LINES, INC.
Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.

Albert V. Bryan, Jr., District Judge.

Argued: February 3, 1981 Decided: October 8, 1981

Before HAYNSWORTH, Chief Circuit Judge, SPROUSE and ERVIN, Circuit Judges.

Melissa Langa, Equal Employment Opportunity Commission (Leroy D. Clark, General Counsel, Constance L. Dupre, Acting Associate General Counsel, Vella M. Fink, Acting Assistant General Counsel on brief) for Amicus Curiae; Wyatt B. Durrette, Jr. (Michael C. Montavon, Chess, Durrette & Roeder, P.C. on brief) for Appellant; Hans U. Stucki, United Air Lines, Inc. (Gregory L. Murphy, Murphy, McGettigan, McNally and West on brief) for Appellee.

CORRECTED OPINION
(Pages 13 & 14)

SPROUSE, Circuit Judge:

Gerald E. Smallwood, plaintiff below, appeals the judgment of the district court in favor of the defendant United Airlines, Inc. in his age discrimination action. After a bench trial, the district court found that United's rule denying employment to pilot applicants over the age of 35 was a bona fide occupational qualification (BFOQ) and that the airline did not violate the Age Discrimination in Employment Act[1] by refusing

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[1] 29 U.S.C. §§ 621-34. The Act's statement of findings and purpose is found at 29 U.S.C. § 621:

(a) The Congress hereby finds and declares that-

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The operative section of the Act provides that

(a) It shall be unlawful for an employer

Footnote continued on next page.

to employ Smallwood because of his age. The major issue on appeal is whether the trial court's decision was clearly erroneous in finding factually that United had sustained its burden of showing that his age requirement is a BFOQ. We reverse.

I.

Smallwood applied to United for a position as a Flight Officer[2] in August, 1977. At that time he was 48 years old and

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Footnote continued from previous page.

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a). The Bona Fide Occupational Qualification exception provides that

> It shall not be unlawful for an employer, employment agency, or labor organization-
>
> (1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

29 U. S. C. § 623(f)(1).

At trial, it was conceded by all parties that United's policy differentiated on the basis of age, and that Smallwood was within the class of persons protected by the Act. Therefore, the only issue at trial was whether United's policy constituted a BFOQ.

[2] United's operational scheme classifies members of aircraft crews as Flight Officers. Within this classification are three

Footnote continued on next page.

had flown 10 years for Overseas National Airways (ONA) in a variety of positions.[3] United replied to Smallwood's employment application with a form letter which listed United's "basic qualifications." Next to "Age 21 through 29" appeared a light pencil checkmark. The letter stated that United could not offer "immediate encouragement," but that Smallwood's application would be retained on file should future reconsideration be warranted. Smallwood replied, requesting reconsideration in light of "our national policy against age discrimination in employment." United replied in December, 1977 that, while Smallwood possessed "fine qualifications," the airline was only processing applications from applicants 21 through 35 years of age. In March, 1978 Smallwood notified the Wage and Hour Division of the Department of Labor that he was charging United with age discrimination and would resort to private litigation if necessary. A conciliation hearing was held between

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positions of seniority and responsibility. All new hires begin as Second Officers, or flight engineers, and then may advance to First Officer, or Co-pilot, and finally to Captain, the command officer on each aircraft. The record discloses that United operates a variety of aircraft ranging from the B-737 jet to the larger and more sophisticated B-747. A normal line of progression has a Flight Officer beginning as a Second Officer on a B-737 and moving up in equipment until they are a Second Officer on a B-747. They would then return to the B-737 as a First Officer, or Co-pilot, and again move up through United's aircraft fleet. A like system is used for advancement as a Captain.

[3] The record indicates that Smallwood joined ONA in 1967 and served as a first officer and captain on DC-8, DC-9 and DC-10 aircraft. It should be noted that United's aircraft fleet includes both DC-8 and DC-10 aircraft and that Smallwood received flight training while at ONA at United's flight training facilities. ONA ceased operations shortly after Smallwood was furloughed in 1977. United contended at trial and on appeal that Smallwood was terminated from employment with ONA for misconduct, which Smallwood denied. This issue was not resolved at trial.

Smallwood, representatives of the Department of Labor and United in April, 1978. On May 5, 1978, United notified Smallwood that while its pilot progression system was designed in the interest of the flying public, there were significant costs involved in the training of pilots, and when coupled with federally-mandated retirement at age 60, a maximum age of 35 at hire was necessary to achieve peak productivity. On May 19, 1978 the Department of Labor notified Smallwood that attempts at conciliation were not fruitful and he was free to proceed as he deemed appropriate. This suit resulted.

United, in initially answering Smallwood's complaint, did not raise the BFOQ defense. In an amended answer filed 50 days later, United alleged the BFOQ exception as an affirmative defense. We find no merit to Smallwood's objection to the trial court's action allowing the amendment pursuant to Fed.R.Civ.P. 15(a). Therefore, the factual issue of whether the age limitation was a BFOQ because it was necessary for the safety of United flights was properly before the trial court.

II.

United's main evidentiary thrust at trial was that airline safety would be adversely affected if it were forced to hire pilots over the age of 35.[4] Its contentions at trial and on appeal are two-fold: that hiring older pilots would impede its "crew concept"—the safe and effective operation of its 3-man crews in a coordinated manner—and that hiring pilots over the age of 35, significantly raising the average age of pilot personnel, would disproportionately increase the chance of medical emergencies during flight.

United's evidence was that older pilots whose experiences were with other airlines might not safely integrate with United's

[4] It should be noted, however, that United's opening statement and initial witness focused on the economic justifications for the age-35-at-hire rule.

crews. Their expert witnesses testified that the basis of the "crew concept" was that their pilots interacted effectively because throughout their career they learned one, and only one, method of aircraft operation—United's. Their testimony focused on the fact that there was an "untraining" factor to be considered when evaluating the desirability of employing pilots with significant prior experience. It was further noted that difficulties might arise when someone moved from a command position elsewhere to a subordinate position with United. Smallwood, on the other hand, presented uncontradicted evidence that major air carriers find applicants with prior Navy or Air Force experience especially desirable.

Medical evidence profferred by United focused on the greater incidence of the conditions which require grounding in pilots ages 50-59. United theorized that such groundings demonstrated a greater potential for in-flight incidents involving older pilots. Dr. Kidera, United's only medical witness, testified that United's company medical examinations were effective in the screening of those individuals whose medical condition posed a threat to air safety, but that medical technology cannot detect all latent health problems. He particularly stressed that it was impossible to pre-determine incidents of minor "strokes" which would probably strike older persons more frequently than younger ones. Testimony of Smallwood's expert witness, on the other hand, was centered on the high degree of certainty with which current medical techniques can predict potential cardiovascular problems. The district court expressly did not adhere to the views of either medical expert in reaching its decision. The trial court made no written findings, but in a ruling announced from the bench adopting most of United's proposed findings of fact, found that the 35 year-old maximum age for new hires was a BFOQ, as United had borne its burden of showing that there was a factual basis for its belief that "all people over 35 would be unable to perform safely and

efficiently the duties of a flight officer" and that it would be impracticable to deal with each applicant on a case-by-case basis. Viewing them, as we must, in the context of the test adopted by this court in *Arritt v. Grisell,* 567 F.2d 1267 (4th Cir. 1977), these findings are clearly erroneous. Fed.R.Civ.P. 52(a).

III.

There can be no doubt that United's crew concept is designed to foster safer flight techniques. Pilots, as a group, must, of course, endure the same aging process as the general population. These unassailable observations, however, are of no help to United in claiming a BFOQ exception for its hiring practices. The legal principle guiding the application of this statutory exception was settled by this court in *Arritt, supra.* To justify a refusal to hire under the BFOQ exception contained in the Age Discrimination in Employment Act, the burden is on the employer to meet a two-prong test:

> (1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . . and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

Id. at 1271. This exception is to be narrowly applied. *Burwell v. Eastern Airlines Inc.,* 633 F.2d 361, 370 n. 15 (4th Cir. 1980) (en banc), *cert. denied,* 101 S.Ct. 1480 (1981).

In reviewing the trial court's resolution of this issue we are impressed with United's overriding theme that hiring older pilots threatens it with burdensome economic effects. United, during pre-trial discovery, reiterated the position taken in its second letter to Smallwood, that is, that there are substantial costs involved in maintaining its pilot progression system, including a significant investment in training as an officer moves between positions and aircraft type. Therefore, by insisting that new pilots be under 35 years of age, the "period of peak

productivity" would be extended. Economic considerations, however, cannot be the basis for a BFOQ—precisely those considerations were among the targets of the Act. *See* 29 C.F.R. § 860.103(h) (1980); *cf. City of Los Angeles v. Manhart*, 435 U.S. 702, 716 (1978) (cost-jurisdiction defense not available in Title VII action). Taking United's defense of a safety-based BFOQ at face value, however, it still does not satisfy the *Arritt* burden.

United contends that it must "untrain" pilots with experience gained flying for other airlines, yet the record indicates that most new pilots are hired from a pool of ex-military pilots with many years of flying experience[5]. There was evidence of only one incident involving a newly hired pilot integrating into an older United crew, and no evidence, statistical or otherwise, concerning the relative ease of integration into the system of ex-military pilots, those joining United by merger, or other newly hired pilots.[6] In short, there is no reliable evidence that United's "crew concept" would be impaired by the sole factor of hiring

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[5] The record indicates that United requires a minimum of 350 hours of prior flight experience, and that from October, 1977 until July, 1978 would accept applications from applicants age 30-35 only if accompanied by advanced flight credentials. Additionally, the uncontradicted testimony of Dr. Mohler, Smallwood's expert witness at trial and former Director of the FAA's Civil Aeronautical Medical Research Institute, indicated that most of today's younger airline pilots are taken directly from the Navy or Air Force, whenever these pilots are available.

[6] In the early 1960's United merged with Capital Airlines to become, at that time, the largest passenger airline in the free world. At that point, Capital personnel were dovetailed into the United flight crew system, with a significant number of Capital command personnel, pilots and co-pilots, moving laterally into equivalent positions with United. Testimony at trial was to the effect that an incident occurred due to a former Capital Captain's failure to follow a United procedure. The record does not indicate whether he merely deviated from United's procedure or reverted to that of Capital.

Flight Officers, starting as Second Officers, over the age of 35. This alleged harm to the "crew concept" is a function of prior experience, not age at hire.

Likewise, United's medical evidence cannot establish that its age requirements are a BFOQ under the *Arritt* standards. Under United's pilot progression policy, Smallwood, if employed, would probably remain a Second Officer until his mandatory retirement at age 60.[7] It is undisputed that a significant number of United's pilots maintain Second Officer status from hire to mandatory requirement to age 60. Not only is there no significant evidence tending to prove "that all or substantially all persons within the class would be unable to perform safely and efficiently," *Arritt, supra,* but the employment of Smallwood would not create a new class or group of pilots in this respect—he would simply become part of a group of second officers 35 years of age or over, whose continued status as pilots strongly tends to disprove United's contention that the employment of pilots in this age group violates their air safety standards. Even were this not so, United's attempt to establish a BFOQ is further frustrated by the second prong of the *Arritt* test. United has provisions in place for the medical testing of its pilots of all ages. United's expert medical witness Dr. Kidera testified at trial that while the FAA mandates periodic physical examinations of all Flight Officers, United's company physical far exceeds the FAA's minimum require-

[7] FAA regulations mandate retirement of pilots and co-pilots at age 60. 14 C.F.R. § 121.383(c) (1980). United mandates retirement at age 60 of all flight officers, including Second Officers. Advancement of flight officers is governed by United's collective bargaining agreement with the Airline Pilots Association, and is on the basis of seniority. Actual experience at United reveals that 8 to 10 years is required for advancement from Second to First Officer, and an additional 6 to 8 years from First Officer to Captain. United does not have an "up and out" policy, so it is conceivable that a flight crew member could remain a second officer indefinitely. If no officer bids on a vacancy, the position is mandatorily awarded to the most junior officer, using an inverse seniority system.

ments. Aimed at a preventive medicine approach, United includes extensive laboratory tests, blood screening, electrocardiograms, urinalysis, chest x-rays and diabetes screening. Examinations are given to Captains every 6 months and to First and Second Officers annually. The scope and depth of each examination is identical across each flight crew position. It was conclusively shown at trial that United's physical examination program was effective in detecting potentially disabling medical conditions, and that future cardiovascular problems could be detected with a high degree of predictability. These preventive medical examinations must have the same degree of predictability as to future medical disabilities for newly-hired 48-year-old pilots from other airlines as they would for career United pilots. In short, United's evidence at trial, while probative of the incidence of medical problems in pilots of advanced age and of the effectiveness of its own examination system, failed to show a relationship between a maximum age-at-hire limitation and airline safety. It has failed to show the impossibility or impracticality of dealing with applicants individually.

IV.

United, on cross-appeal, contends that Smallwood's claim is time-barred by 29 U.S.C. § 626(d)(1),[8] which requires that a charge alleging discrimination be filed with the Department of Labor within 180 days of the alleged discriminatory act.

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[8] (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such charge shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, ... 29 U.S.C. § 626(d)(1). This section was amended in 1978 to its current language. Previously, the section focused on "notice of intent to sue." The 1978 amendment is applicable to all civil actions brought after April 6, 1978. Smallwood's complaint was filed May 18, 1979. Small-

Footnote continued on next page.

United's first reply to Smallwood's application was dated August 24, 1977 and was received by Smallwood shortly thereafter. The charge of discrimination was filed by Smallwood on March 24, 1978, 212 days later. United's second letter to Smallwood was dated December 12, 1977. He argues that United's refusal to employ him, communicated by the second letter, was a discrete act comprising age discrimination. (His charge was filed within 180-days from that date.) The trial court held that the discrimination was committed by United's first letter of August 24, 1977, but that Smallwood's claim was not barred because equitable considerations tolled the running of the 180-day period.

We agree the claim is not time barred, but do not reach the issue concerning equitable tolling of the statute of limitations. United's first response was a form letter on which was printed a list of United's "basic qualifications." One of the listings simply stated "age 21 through 29" and next to this, when Smallwood received it, was a light pencil check mark. Significantly, Smallwood's application was not rejected by this letter. Rather, he was informed that United could not offer "immediate encouragement" and that his application would be retained on file for possible future consideration. It was United's second letter to Smallwood that clearly rejected his request for employment. We agree with Smallwood this letter of December 12, 1977, comprised the discrete act of discrimination and that this act occurred less than 180 days prior to the filing of Smallwood's charge with the Department of Labor.

The judgment of the trial court is, therefore, reversed and remanded for action consistent with this opinion.

REVERSED AND REMANDED.

Footnote continued from previous page.

wood's letter to the Department of Labor was captioned "Notice of Intent to Sue—Charge of Discrimination." *See* H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 533.

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 80-1111

GERALD E. SMALLWOOD,

Appellant,

v

UNITED AIR LINES, INC.,

Appellee.

No. 80-1153

GERALD E. SMALLWOOD,

Appellee,

v

UNITED AIR LINES, INC.,

Appellant.

ORDER

The petition for rehearing filed by United Air Lines, Inc. and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Sprouse.

For the Court
/s/ William K. Slate, II
William K. Slate, II
Clerk

FILED
Jan-8-1982
U. S. Court of Appeals
Fourth Circuit

Opposition

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED AIR LINES, INC.,
Petitioner,

v.

GERALD E. SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully disagrees with Petitioner's statement of the question presented for review. The real question, if any, in this case is, as stated by the Court of Appeals:

> [W]hether the trial court's decision was clearly erroneous in finding *factually* that United had sustained its burden of showing that this age requirement is a BFOQ.

Pet. App. 14a (emphasis added).

PARTIES

Respondent would like to clarify that the United States Equal Employment Opportunity Commission was *not* a party in the Court of Appeals for the Fourth Circuit, as stated by Petitioner, but simply participated as an *amicus curiae*. The only parties in the courts below were Gerald E. Smallwood and United Air Lines, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1883

UNITED AIR LINES, INC.,
Petitioner,

v.

GERALD E. SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Gerald E. Smallwood (hereinafter "Smallwood") respectfully prays that the Petition for A Writ of Certiorari requested herein by United Air Lines, Inc. (hereinafter "United") be denied.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Fourth Circuit, Pet. App. 12a-22a, adequately

and accurately relates the facts of this case pertinent to this Petition. Restatement of those facts here would be repetitious and burdensome for this Court.

SUMMARY OF ARGUMENT

I. The issue in this case is whether United produced sufficient evidence to satisfy its burden of proving that its maximum age limitation of thirty-five constituted a bona fide occupational qualification (BFOQ) under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* (the Act). After carefully reviewing the evidence adduced at trial, the Court of Appeals held that United simply did not prove its case. In its Petition, United challenges the conclusion of the Court of Appeals, and asks this Court to review the evidence in the record in this case, and to decide whether United's burden was satisfied. This limited factual issue involves only the parties in this case. In addition, the parties in this case agreed in the courts below as to the applicable legal standard. Because this case presents factual issues limited solely to this case, a Writ of Certiorari should be denied.

II. Even if this Court were to review the evidence in this case, it would determine that the Court of Appeals was correct in its decision. The evidence and record simply do not support United's assertions. On the contrary, the evidence clearly demonstrates that United's age-at-hire limitation is in no way related to safety or other legitimate considerations.

III. Because United agreed in the courts below as to the legal standards applicable to this case, it cannot now argue for the first time that an alleged "conflict" exists in the circuits. Moreover, this case and the alleged conflicting decision are markedly different in both the facts presented and the theories advanced.

ARGUMENT

I. THE ISSUES RAISED BY THIS PETITION ARE PURELY FACTUAL AND ARE NOT SUFFICIENT FOR A WRIT OF CERTIORARI.

As Justice Holmes stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925), this Court does not ordinarily grant certiorari "to review evidence and discuss specific facts." Although United offers no rationale as to why this case should be elevated from the "ordinary," a review of its Petition leads to the inescapable conclusion that it has merely asked this Court "to review evidence and discuss specific facts."

Nearly six pages of United's Petition, Pet. 1-6, are devoted to a recitation of what United believes are the important facts of this matter. Even a brief review of those pages discloses that, should this Court grant the Petition, it would necessarily have to review the entire record of this case, including the trial transcripts, trial exhibits and specific findings of the courts below. In addition, Smallwood argued below that the justifications advanced by United to support its BFOQ defense were pretexts;[1] that is, United's blanket age restriction was in fact based upon pure economic considerations, and not upon health or safety factors as United argued. Resolution of this issue necessarily involves reviewing the various pleadings and motions filed in the District Court. Not only did United fail even to assert the BFOQ defense until some forty days after filing its original Answer, but also largely premised its Motion for Summary Judgment upon economic considerations. The Court of Appeals stated that "we are impressed with United's overriding theme that hiring older pilots threatens it with burdensome economic effects," Pet. App. 18a, and noted that "United's opening statement and initial witness focused on the economic justifications for the age-

[1] The EEOC made this same argument to the Court of Appeals.

35-at-hire rule."[2] Pet. App. 16a n.4. The Court of Appeals went further, however, and, taking United's defense of a *safety*-based BFOQ "at face value," Pet. App. 19a, found United still failed to produce sufficient evidence to support the theories it advanced.

As noted previously, the major issue before the Court of Appeals was "whether the trial court's decision was clearly erroneous in finding *factually* that United had sustained its burden of showing that this age requirement is a BFOQ." Pet. App. 14a (emphasis added). United's Petition in essence does nothing more than restate its factual arguments and readdress this same factual issue.

The Court of Appeals conducted a careful review of the record and found that United had simply not produced sufficient facts to support the theories it advanced, and thus failed to satisfy its burden. In addition, the Court of Appeals refused to grant either United's Petition for Rehearing or its Suggestion for Rehearing en Banc. Pet. App. 23a.

Moreover, United's inaccurate statement of the facts should be noted. United characterizes its letter to Smallwood dated August 29, 1977, as a "rejection." Pet. 2. United does not mention that the Court of Appeals clearly held that ". . . Smallwood's application was *not* rejected by this letter." Pet. App. 22a (emphasis added).

Similarly, United refers to "one major aircraft landing *accident* involving a former Capital pilot *who reverted to his prior training practices* during an emergency." Pet. 10 (emphasis added). United does not mention that the Court of Appeals held:

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[2] This contrasts markedly with United's characterization of its economic considerations and the extent to which it relied on them. The record simply belies United's contention that its "primary defense . . . was always based upon safety considerations . . . ." Pet. 3 n.3.

> Testimony at trial was to the effect that an *incident* occurred due to a former Capital Captain's failure to follow a United procedure. The record does *not* indicate whether he merely deviated from United's procedure or reverted to that of Capital.

Pet. App. 19a n.6 (emphasis added).

These inaccuracies forwarn this Court of the factual quagmire it would enter by granting United's Petition, and perhaps unintentionally disclose the weaknesses of the facts in the record as noted by the Court of Appeals.

Clearly, the factually specific nature of this case, and the factually specific nature of the holdings of the courts below, suggest that a decision by this Court would have the limited effect of resolving the controversy only between the parties, and thereby have little, if any, value as an exposition of the law. This is particularly true where, as here, both United, Smallwood and EEOC agreed below as to the appropriate legal standard to be applied to the facts of this case. *See infra* p. 6. This absence of a genuine "legal," as opposed to a factual, controversy should result in denial of Certiorari herein.

II. EVEN IF THIS COURT DECIDED TO REVIEW THE FACTUAL RECORD IN THIS CASE, IT WOULD CONCLUDE THAT THE COURT OF APPEALS WAS CORRECT IN DETERMINING THAT UNITED FAILED TO SATISY ITS BURDEN OF PROOF TO ESTABLISH THAT ITS BLANKET AGE RESTRICTION CONSTITUTED A BFOQ.

Smallwood submits that even if this Court were to grant United's Petition and thereafter undertake a comprehensive review of the factual record and findings in this case, it would ultimately determine, as did the Court of Appeals, that the District Court's findings were clearly erroneous. The principal finding of the District Court was that:

> . . . United had borne its burden of showing that there was a factual basis for its belief that 'all people over 35 would be unable to perform safely and efficiently the duties of a flight officer' and that it would be impracticable to deal with each applicant on a case-by-case basis.

Pet. App. 17a-18a.

The effect of such a ruling would be to make passing the age of 35 a *per se* disqualification for being a flight officer. United's evidence at trial showed that approximately three-quarters of its own pilot population were beyond the age of 35. On its face, therefore, such a ruling is clearly erroneous.

Moreover, this ruling is unsupported by the other evidence adduced at trial, specifically disregards the testimony by the medical experts that experienced older pilots have a safer record than younger pilots, disregards the regulations of the Federal Aviation Administration (FAA) which suggest that no safety risks exist for flight officers simply because they are over 35 and ignores the normal practices in the industry. As the following brief review of the evidence demonstrates, the Court of Appeals was clearly correct in its holding.

Both Smallwood and United, as well as the EEOC, agreed that the proper standard for evaluating United's burden of proof to support a BFOQ was set forth in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977):

> Appellant [Smallwood] quite correctly states the standard applicable to the case is found in the case of *Arritt v. Grisell* . . .

Brief of United before the Court of Appeals, p. 28. *See also* Brief for the EEOC as *Amicus Curiae* at the Court of Appeals, p. 19.

The *Arritt* standard is that the employer has the burden of showing:

> (1) That the bfoq which it invokes is reasonably necessary to the essence of its business . . . and

> (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

567 F.2d at 1271.

There is no question but that the "essence" or "primary function" of an airline is to transport passengers safely from one point to another. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). Thus, to satisfy the BFOQ burden, United had to prove that its 35-year age limitation for hiring flight officers was reasonably necessary to safe transportation *and* that it had a factual basis for believing that persons over age 35 were unable to perform flight officer duties safely and efficiently, or that it was impossible or impractical to deal with persons over age 35 on an individualized basis.

In determining that United failed to meet this burden, the Court of Appeals divided its analysis into three parts. First, it examined the economic considerations as advanced by United. In the second and third parts of its analysis, the court found respectively that United's "crew concept" and "medical/safety" arguments were unsupported by the evidence in the record.

As noted previously, the Court of Appeals was "impressed" with United's "overriding theme" that hiring older pilots would cause it to suffer economically. Both Smallwood and the EEOC argued that economic considerations were the only true considerations for United's age-restrictive policy, and that the other reasons advanced by United were simply pretextual. Smallwood also argued that the employer should be held to the *actual* reason at the time of the discriminatory act as

the basis upon which the BFOQ should be determined, not one later discovered, whether valid or not. Despite the fact that the Court of Appeals was "impressed" with this "overriding theme" of United, it considered the other arguments "at face value." Clearly, the Court of Appeals in so stating was suggesting, although not ruling, that economic considerations provided primary support for United's age-restrictive policies. The Court of Appeals was clearly correct in ruling that economic considerations cannot form the basis for a BFOQ; on the contrary, it was precisely such economic considerations which were among the targets of the Age Discrimination in Employment Act. *See* Pet. App. 19a. Obviously, there is no error in that ruling of the Court of Appeals, nor does United so contend.

A. United failed to show that its "crew concept" would be impaired by elimination of its age-restrictive policy.

To meet the first prong of the *Arritt* test for United's contention that hiring pilots over age 35 would impair its "crew concept," United had the burden of proving that its own special "crew concept" is required by safety considerations and therefore is linked to the "essence" of its business. As the Court of Appeals noted, the "crew concept" is the operation of a three-person cockpit crew in a coordinated manner. Pet. App. 16a. There was uncontradicted testimony at trial that all critical aspects of cockpit procedure are standardized by the FAA. There was no evidence that United's procedures were in any way materially different. Nor was there any evidence that flight procedures utilized by United were different from other airlines, such as Mr. Smallwood's previous employer, Overseas National Airways (ONA). Moreover, the evidence was uncontradicted that United trained pilots for other airlines and that, in fact, Mr. Smallwood himself had received training from United at United's Flight Training Fa-

cilities at the time that he was employed by ONA. Pet. App. 15a n.3.

Even assuming, *arguendo*, that United's own special "crew concept" was required by safety considerations, however, the second prong of the BFOQ test was still not satisfied. There was simply no adequate factual basis shown to support the notion that pilots over age 35 were untrainable in United's "crew concept" or that the ability to meet United's "crew concept" could not be reliably determined by some test other than automatic exclusion on the basis of age.

As regards the "untraining" aspects, United contended below and contends now that there is a problem with "untraining" when older pilots are hired. Pet. 4, 10, 16. The evidence by both sides on this issue is summarized by the Court of Appeals as follows:

> United's evidence was that older pilots whose experiences were with other airlines might not safely integrate with United's crews. Their expert witnesses testified that the basis of the 'crew concept' was that their pilots interacted effectively because throughout their career they learned one, and only one, method of aircraft operation—United's. Their testimony focused on the fact that there was an 'untraining' factor to be considered when evaluating the desirability of employing pilots with significant prior experience . . . . Smallwood, on the other hand, presented uncontradicted evidence that major air carriers find applicants with prior Navy and Air Force experience especially desirable.

Pet. App. 16a-17a.

As the Court of Appeals perceptively pointed out, "[t]his alleged harm to the 'crew concept' is a function of prior *experience, not age at hire.*" Pet. App. 20a (emphasis added). In other words, according to United, a pilot with too much prior experience, at whatever

age, would pose a problem in learning United's crew procedures.

United cannot argue that prior experience creates safety problems because United itself requires all applicants to be experienced pilots. Pet. App. 19a n.5. As the uncontradicted testimony of Dr. Mohler showed, most new pilots are hired from a pool of ex-military pilots with many years of flying experience. *Id.*[3] In fact, United has argued the contrary position in the past, forcefully advancing the value of advanced flight credentials. In *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir. 1972), United was defending its minimum requirements, including its requirement of five hundred hours of prior flight time, against a racial discrimination claim. In so doing, United emphasized the value of prior experience, particularly in jet aircraft. *See also Kodish v. United Air Lines, Inc.*, 628 F.2d 1301 (10th Cir. 1980) (United gave the availability of other applicants with greater experience as its reason for rejecting an applicant). United should not be allowed to argue before one court that its significant prior experience requirement is necessary and then argue in another court that such prior experience is a handicap. Even if United is allowed to maintain such patently inconsistent positions before different courts, however, its argument merely asserts that "prior experience, not age" should be the disqualifying factor.

Finally, in considering the "untraining" evidence, United pointed to only one isolated "example" of the difficulties associated with integrating experienced pilots

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[3] United presented "evidence of only one incident involving a newly hired pilot integrating into an older United crew, and no evidence, statistical or otherwise, concerning the relative ease of integration into the system of ex-military pilots, those joining United by merger, or other newly hired pilots." Pet. App. 19a.

into its flying philosophy. United states that when the merger of Capital Airlines and United took place in 1961, "[t]hese difficulties resulted in at least one major aircraft landing accident involving a former Capital pilot who reverted to his prior training practices during an emergency." Pet. 10. This is obviously a mischaracterization and an exaggeration of the evidence when compared to the Court of Appeals description of the "incident" and the testimony at trial. As noted previously, the Court of Appeals found that "[t]he record *does not indicate* whether he merely deviated from United's procedure or reverted to that of Capital." Pet. App. 19a n.6 (emphasis added). United's own witness and the *only* witness on this subject, Captain Smith, testified that the pilot involved failed "to respond in the way that the United procedures called for." Trial Transcript, p. 137. Petitioner's characterization of the evidence that the pilot "reverted to his prior training practices during an emergency" is obviously unfounded in the record. Moreover, it is obvious that whatever safety risks United might advance caused by "untraining," they were not sufficient to prevent its merger with Capital, nor numerous other airline mergers as well.

United further argues that hiring older pilots would impair its "crew concept" in that older experienced pilots cannot be retrained because of a decreased ability to learn. Not only is such an offensive stereotype exactly what the Act seeks to eliminate, but United also failed to present factually specific evidence to support its contentions. On the contrary, the fact that United merged with another airline, the fact that United requires significant prior experience, the fact that United trains other airlines' pilots, including Mr. Smallwood, the fact that United has training programs whenever one of its pilots advances to either a different cockpit seat or to a different type of aircraft, and the fact that technology never stands still, thereby requiring regular, if not con-

tinuous, new equipment orientation, all belie United's assertions. Thus, the Court of Appeals was clearly correct in concluding that the evidence failed to establish any relationship between *age-at-hire* and the ability to master United's "crew concept."

B. United failed to show how its "medical/safety" theory related to its age-at-hire limitation.

United's medical/safety evidence was similarly insufficient to form the basis for a BFOQ.[4] The Court of Appeals found that ". . . United's evidence at trial, while probative of the incidence of medical problems in pilots of advanced age and of the effectiveness of its own examination system, failed to show a relationship between a maximum age-at-hire limitation and airline safety.[5] Pet. App. 21a. What relationship may exist between medical problems and age, simply has no bearing or relationship to medical problems and *age-at-hire.*

In any case, United's own testimony conclusively showed "that United's physical examination program was effective in detecting potentially disabling medical conditions . . . These preventive medical examinations must have the same degree of predictability as to future medical disabilities for newly-hired 48-year-old pilots from other airlines as they would for career United

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[4] From its Petition, United is at best unclear as to how its alleged medical/safety evidence supports a BFOQ. Apparently, the best available medical information is a factor in fostering a crew concept in some unspecific way. *See* Pet. 11.

[5] There is no validity to United's argument that the Circuit Court's decision places United in conflict with its statutory duty to operate with the highest degree of safety, since as stated above, there has been shown no relationship between the maximum age-at-hire limitation and airline safety. Nor is there validity to United's concerns that the Court of Appeals' decision jeopardizes United's progression system. Smallwood has never challenged this system. On the contrary, he seeks only to be treated like any other newly hired flight officer.

pilots." Pet. App. 21a. There is no safety risk not already presented by United's own flight personnel.

Accordingly, the Court of Appeals was correct in ruling that United simply failed to satisfy its burden of proof to show that its limitation as to *age-at-hire* is necessary from any operational or safety aspect. United's Petition does nothing more than challenge this conclusion.

III. THERE IS NO MERIT IN UNITED'S CONTENTION THAT THIS COURT SHOULD RESOLVE THE ALLEGED "CONFLICT" BETWEEN THE PRESENT CASE AND THAT OF *MURNANE* v. *AMERICAN AIRLINES.*

As noted previously, all parties were in agreement as to the appropriate legal standard to be applied to the facts of this case. Thus, even assuming *arguendo* that the legal standard of this case differs from that of *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3797 (U.S. April 6, 1982) (No. 81-1502), a position which United does not argue in its Petition,[6] United is precluded from arguing that point for the first time before this Court. As this Court noted in *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958), "[o]nly in exceptional cases will this Court review a question not raised in the court below." This is certainly not an exceptional case, nor does United so argue. Accordingly, United is therefore precluded from raising any alleged conflict of legal standards at this stage of the proceedings. Moreover, United did not list this as an issue in its Question Presented for Review. For these reasons alone, United's position is without merit.

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[6] A review of pp. 7-8 of United's Petition convincingly demonstrates that United has only argued that the *results*, and the facts or lack thereof on which each is based, are different.

United is really arguing that because American Airlines sustained its burden of proof in *Murnane*, that "holding" should be applied to this case. Obviously, different facts and circumstances, as well as different evidentiary presentations, frequently dictate different results. That is all that happened in these two cases. Even the following brief overview of the evidence shows that American presented far different evidence at trial than did United. This review also demonstrates that United is simply incorrect in stating that the "evidence and findings of fact [are] virtually identical" in this case and in *Murnane*.

In *Murnane*, the Court of Appeals found that:

> The gravamen of appellant's claim arises out of appellee's established employment hiring practices. American maintains three cockpit positions, Flight Officer, Co-pilot and Captain. It is American's fixed policy *to require* all Flight Officers to advance to the position of Captain. No one is hired by American without this goal in mind. This is referred to as America's 'up-or-out' policy. More specifically, if a Flight Officer or Co-pilot has received the maximum amount of training required for such position and is not qualified at that juncture to advance to the next post, then it is American's policy to terminate such person's employment. American's procedures *do not allow* for a career as a Flight Officer or Co-pilot.

667 F.2d at 99 (emphasis added).

In the present case, the Court of Appeals found:

> United does not have such an 'up and out' policy, so it is conceivable that a flight crew member could remain a second officer indefinitely.

Pet. App. 20a n.7. In other words, a United pilot is allowed to make a career as a first or second officer since there is no forcible advancement. This is a significant factual difference.

Another example of the difference in evidence presented is that United relied upon a theory that its age 35 rule is necessary because medical and training problems are involved in hiring older pilots.[7] To the contrary, the court in *Murnane* expressly rejected the notion that there is a correlation between aging and decreased ability to perform:

> It is noteworthy to us that the district court did not premise his BFOQ determination on a finding that there exists a correlation between the increased chronological age of a pilot and his or her decreased ability to operate an aircraft in a safe manner.

667 F.2d at 100 n.4. In view of American's "up-or-out" policy, the court in *Murnane* upheld the finding that the maximization of safety was achieved at American by hiring young pilots who would be able to fly as American *captains* for 10-12 years prior to ceasing their role as captains at age 60.

United, on the other hand, without an "up-or-out" policy, does not require any pilot to become a captain. It did not contend or present evidence during the litigation that safety requires that all United pilots serve the maximum possible length of time as *captains*. It relied instead on its "crew concept," but its evidence was unpersuasive. American, however, could make such a contention and did produce evidence at trial which the Court found sufficient to support its position.

While there are numerous other factual differences, the foregoing examples clearly illustrate that the two cases are distinguishable. Because of this fact and be-

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[7] United argues that "the real foundation of [the District Court's] opinion is stated to be the inability of a person over 35 'to acquire the necessary experience,' that is to learn the United system, in order to safely and efficiently carry out the duties of a flight officer." Pet. 13.

cause the standard of review has never been an issue in this case, there is no merit to United's suggestion that a "conflict" in the circuits needs to be resolved.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

SMALLWOOD'S OPPOSITION FURTHER ILLUSTRATES THAT UNITED ESTABLISHED ITS AGE RESTRICTION AS A BONA FIDE OCCUPATIONAL QUALIFICATION

In his Opposition to Certiorari in the instant case, Smallwood urged that a review of this case would necessarily involve review and discussion of certain specific facts attendant this case. He further stated that this Court does not ordinarily grant

certiorari exclusively for these purposes. *United States* v. *Johnston,* 268 U. S. 220 (1925). While United does not dispute this as a general proposition of law, the *Johnston* case itself reflects, however, that analysis and discussion of specific facts is virtually always necessary to some extent.[1] Significantly, Smallwood's opposition serves only further to highlight just how few material facts are truly in dispute in the present case.

Smallwood accurately cited the *Arritt* v. *Grisell,* 567 F. 2d 1267 (4th Cir. 1977), standard applied by the District and Circuit Courts as follows:

> (1) That the bfoq which it invokes is reasonably necessary to the essence of its business . . . and
>
> (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.
>
> 567 F. 2d at 1271.

Given the fact that safety is the essence of an airline's business, *Diaz* v. *Pan American World Airways, Inc.,* 442 F. 2d 385 (5th Cir. 1971), *cert. denied* 404 U. S. 950 (1971), and the acknowledgement by the Circuit Court that United's crew concept is designed to foster safety (A18), only the two-pronged second test remained for review by the courts in this case.

Regarding the disqualification of all or substantially all the members of the class, the testimony of Captain J. D. Smith at trial was wholly unmet by contrary expert testimony.[2] Further,

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[1] It should be noted that the trial of this case was completed in one day such that the record is not voluminous.

[2] Contrary to Smallwood's insinuation, the persons in the affected class are pilots *hired* after age 35, not pilots who are older than age 35. (A2)

the medical testimony of Dr. Kidera as to the deprecations associated with aging and the ability of United's training system to compensate for these deprecations was also unchallenged. This testimony was important in illustrating that prior conflicting experience can be an operational problem in flying emergencies and that age itself can be a barrier toward overcoming the effects of prior philosophies and learning new ones.[3] Maximization of safety is not, therefore, purely a function of eliminating applicants of prior conflicting experience as the Circuit Court concluded, but rather also of hiring potential pilots at an age where maximum integration of United's flying philosophy is possible.

On the issue of the impracticality of dealing with individual pilot applicants, the testimony of Dr. Kidera was questioned in only one limited respect, i.e. the predictability of coronary attacks. No evidence was offered in opposition to his testimony on the lack of predictability of all other potentially disabling ailments and there was absolutely no evidence contrary to the fact that to increase the numbers of persons in the higher age categories is to proportionately increase the risk of inflight medical emergency. The Circuit Court was, therefore, in error in concluding that no new risk would be created by elimination of the age restriction. The uncontroverted testimony of Dr. Kidera had, indeed, established that an influx of older pilots would necessarily increase the risk of unforeseen medical emergency.

The significance of all of the foregoing testimony is critical in that it is precisely this evidence upon which the District Court relied in ruling in favor of United. (See particularly, Findings of Fact 22 and 32 at A9 and A10, and the Court's Ruling at A2.) Smallwood's failure to in any manner address these

[3] These facts are especially important here, for while Smallwood did receive certain courses of training at United's Flight Training Center in Denver, his long-term day-to-day exposure at an early age was not to United's operational flying philosophy but rather to those of two other airline pilots.

bodies of evidence is of course understandable, for he may not create dispute or conflict in the evidence where none exists in the record. His silence in these areas, however, is dramatic evidence of the error inherent in the Circuit Court's reasoning.

Unable to directly address the issues ignored by the Circuit Court, Smallwood thus seeks to divert this Court's attention to matters which, while in dispute, are immaterial. Smallwood repeatedly dramatizes the fact that United also made an economic argument in defense, when neither Court decided the issue on this basis. He further attributes great significance to United's use of the more common word "accident" rather than the aeronautical term "incident" in describing a particular landing mishap reflected in the testimony of Captain Smith.[4] How ever one might refer to such an event, its very occurrence coupled with Captain Smith's testimony of other and lesser problems certainly establish the "reasonable cause" to justify the validity of United's age restriction.

Finally, Smallwood deems it important to dispute whether United's first letter to him constituted a rejection of his employment application. Since the timeliness of his notice to the Department of Labor is not on appeal herein, the relevance of this issue seems also distant.

The Circuit Court was not free to set aside the findings of the District Court unless clearly erroneous. Federal Rule of Civil Procedure 52(a). Smallwood's Brief in Opposition to Certiorari only further illustrates the utter failure of the Court to apply the standard which it recited as applicable to its review. Indeed, given the specific findings of the District Court and the wholly uncontradicted nature of the evidence relied upon by that Court, one must conclude, as this Court recently did in

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[4] Smallwood alleges that only one such incident occurred when the uncontradicted testimony shows that "some of these" occurred. The record also indicates, contrary to the Circuit Court's "careful review", that Captain Smith was discussing an example of an event wherein an individual reverted to a "previous philosophy".

another case, that the Circuit Court's decision was "the product of the Court's independent consideration of the totality of the circumstances it found in the record". *Pullman-Standard, A Division of Pullman, Inc.* v. *Swint,* 50 U. S. L. W. No. 4425, 4430 (April 27, 1982). As Justice White observed in *Swint,* if a Court deems a finding of fact to be infirm due to erroneous interpretation of the law, remand is the proper remedy. A reviewing Court, however, may not, as here, merely substitute its judgment on issues of fact for those of the District Court.

II.

THE CONFLICT IN THE LAW OF THE CIRCUITS IS UNEQUIVOCAL

In further opposition to United's Petition for Certiorari, Smallwood fervently argues that no true conflict in the law of the circuits exists. 'The remarkable factual similarities of *Murnane* v. *American Air Lines, Inc.,* 482 F. Supp. 135, *aff'd.* (D. D. C. 1979), 667 F. 2d 98 (D. C. Cir. 1981) and the present case have been previously mentioned and need not be further reported here.[5] In terms of legal similarities, it is sufficient to state that both Courts were confronted by a maximum age of hire restrictions for airline pilots, both heard operational and medical testimony in support of a bona fide occupational qualification and the cases presently stand in conflict in their results.[6]

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[5] This Court has recently denied certiorari in *Murnane,* Docket No. 81-1502. 50 U. S. L. W. 3798 (April 1, 1982). The importance of the instant case to resolve the present conflict in the law of the circuits is thus further illustrated.

[6] *Spurlock* v. *United Air Lines, Inc.,* 475 F. 2d 216 (10th Cir. 1972) and *Kodish* v. *United Air Lines, Inc.,* 628 F. 2d 1301 (10th Cir. 1980) cited by Smallwood involved totally different issues and young pilot applicants who met United's age requirements. Actual flying experience is a consideration for selection among young people whose training and flying hours are necessarily limited. These cases do not reflect a contrary position taken by United.

It is not in dispute that airlines are under a statutory mandate to operate with the "highest possible degree" of care for the safety of the traveling public. 49 U. S. C. § 1421(b)

It is not in dispute that airlines are under a statutory mandate to operate with the "highest possible degree" of care for the safety of the traveling public. 49 U. S. C. § 1421(b). The Courts in *Murnane supra* focused upon consistency of pilot training and long-term exposure thereto as hallmarks in the maximization of safety.[7] The Circuit Court in the present case not only failed to address the statutory standard, but apparently concluded that experience of any type is sufficient and that long-term exposure is not important. The Court's conclusion came over entire bodies of uncontested evidence offered by United's witnesses to the contrary. A clearer conflict in the results of the cases can scarcely be imagined.

Finally, appellee makes much of United's failure upon obtaining judgment under the *Arritt* standard to protest that the standard of *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974), *cert. denied*, 419 U. S. 1122 (1975), should have been applied. In this regard, United asserts merely that there was and is no realistic reason to believe that the standards related to the safety of the traveling public should be less in the Fourth Circuit than in the Seventh Circuit and, United in fact, continues to urge that any conflict as may now exist between the standards is purely the result of the Fourth Circuit's erroneous interpretation of *Arritt, supra*. Whether due to direct conflict or conflict by virtue of erroneous interpretation, the matter of the standard to be applied to the safety and welfare of the traveling public is an issue worthy of this Court's attention.

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[7] Smallwood attempts to avoid the claim of a conflict among the circuit courts by distinguishing *Murnane* on the ground that American Airlines maintains an "up or out" policy. In practice, there is little or no difference between the policies of United and American. With the exception of a very small number of career Second Officers who hold that status by reason of a "grandfather" agreement, United's current policy in practice is "up or out".

III.

CONCLUSION

For the reasons stated above and contained in the Petition, United respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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